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ONG TENG FOR & ANOR

v.

PP

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FEDERAL COURT, PUTRAJAYA

RAUS SHARIF PCA

ZULKEFLI MAKINUDIN CJ (MALAYA)

AHMAD MAAROP FCJ

ZALEHA ZAHARI FCJ

C

SULONG MATJERAIE FCJ

[CRIMINAL APPEAL NO: 05-169 & 170-2011(A)]

1 NOVEMBER 2012

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CRIMINAL LAW: Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Whether any reason for appellate interference by Federal Court

CRIMINAL PROCEDURE: Appeal - Appeal against conviction and sentence - Whether any reason for appellate interference by Federal Court

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The appellants were charged, convicted and sentenced to death for murder in the High Court. Their appeal to the Court of Appeal was dismissed and they appealed to the Federal Court. On behalf of the appellants, the following issues were raised: (i) the trial judge ought to have recused himself after the disclosure by defence counsel that the first appellant was changing his line of defence since a likelihood of bias had emerged; (ii) the Myanmar interpreter lacked the *locus standi* to record the evidence of PW3 and as such the evidence of PW3 should be expunged; (iii) the Court of Appeal failed to recognize that the High Court Judge had failed to test the evidence of PW3 more vigorously in accordance with a maximum evaluation; and (iv) the prosecution had failed to call or offer for cross-examination the counsel who was holding a watching brief for the family of the deceased victim.

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Held (dismissing the appeal)**Per Raus Sharif PCA delivering the judgment of the court:**

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(1) The Federal Court did not perceive that the disclosure made by the defence counsel amounted to telling the judge that the first appellant would lie in putting up his defence. There was no way for the court at that stage to know or identify

whether the first appellant would be lying or otherwise. This was especially so when the cautioned statement was not before the court. (para 13) A

(2) In the instant appeal, from the notes of the trial judge it was unlikely that trial judge would have been biased. Neither was there any reason to suspect that as a result of the disclosure the trial judge was incapable of producing the impartiality or detachment in deciding the case. (paras 14-16) B

(3) In the instant case, the Federal Court did not see any real danger of bias on the part of the trial judge in continuing to preside over the trial. The notion of depriving an accused of a fair trial, occasioning a miscarriage of justice must not be taken to the extreme. It must be based on the facts and circumstances of each case. On the facts and circumstances in the instant case, the appellants had not been deprived of a fair trial occasioning a miscarriage of justice. (para 18) C D

(4) There was no necessity to recall the Myanmar interpreter to state his qualification. In the present case, the interpreter was called to the High Court to interpret the evidence of PW3. Being a registered Myanmar interpreter with the Federal Court Registry and by reason of his appointment thereof, he assumed the role of an official interpreter of the court. He was therefore clothed with the powers to administer oaths and affirmations. For all intents and purposes, he was an officer of the court. Thus, there was no necessity for a special order of the court to be made before he dispensed his duties. (paras 23 & 24) E F

(5) The Court of Appeal was correct in ruling that the trial judge was right in accepting the evidence of PW3. The appellants' contention that PW3 was an interested witness was without any basis. Even if PW3 was an interested witness, there was no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances. It was incumbent on the trial court to decide having regard to the probabilities of the case and based on contemporaneous facts and documents, whether the witnesses or set of witnesses were G H I

- A speaking the truth on matters of central importance. In the instant case, the Federal Court was unable to hold that the testimony of PW3 should be discredited and not to be believed. His evidence on points of critical importance remained intact. (para 29)
- B (6) The prosecution's omission to state certain facts in its opening statement was inconsequential and did not affect the credibility of PW3. Such facts could be revealed at the trial stage. The Federal Court would uphold the credibility findings by the trial court and the Court of Appeal.
- C (7) The prosecution has a discretion as to which witness should be called and the court will not interfere unless it is shown that the prosecution has been influenced by some oblique motive or the witness had been deliberately or unfairly held back and no reasonable explanation is given by the prosecution for the non offering of the witness. The test is whether there was any conscious attempt to suppress facts from the court by not tendering that particular piece of evidence. In the instant case, the non calling of counsel holding the watching brief or at least offering him for cross examination by the prosecution had not compromised the credibility of PW3.
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- F (8) In the instant case, the trial judge had considered all of the evidence adduced at the trial, evaluated the relevant circumstances, and assessed the credibility of the witnesses, including the finding that the evidence of both the appellants were to be disbelieved, before arriving at the conclusion that the prosecution had established its case beyond reasonable doubt and the appellants had failed to raise a reasonable doubt to the charge. The Court of Appeal found no valid reason to interfere. The Federal Court itself found no reason to interfere.
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Bahasa Malaysia Translation Of Headnotes

- H Di Mahkamah Tinggi, perayu-perayu telah dituduh, disabitkan dan dihukum mati atas kesalahan bunuh. Rayuan mereka ke Mahkamah Rayuan telah ditolak dan mereka merayu ke Mahkamah Persekutuan, di mana persoalan-persoalan berikut antara lain telah dibangkitkan bagi pihak mereka, iaitu: (i) hakim bicara sepatutnya
- I menarik diri dari mendengar kes setelah pendedahan dibuat oleh

peguam pembelaan bahawa pembelaan menukar asas pembelaannya, yang berakibat wujud kemungkinan berat sebelah; (ii) penterjemah berbangsa Myanmar tidak mempunyai *locus standi* untuk merekodkan keterangan SP3 dan keterangan SP3 dengan itu seharusnya dikeluarkan dari rekod; (iii) Mahkamah Rayuan gagal merumuskan bahawa hakim Mahkamah Tinggi gagal menguji keterangan SP3 secara lebih terperinci dan selaras dengan penilaian maksima; dan (iv) pendakwaan gagal memanggil atau menawarkan untuk pemeriksaan balas, peguam pemerhati yang hadir bagi pihak keluarga mangsa simati.

Diputuskan (menolak rayuan)

Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

- (1) Mahkamah Persekutuan tidak melihat pendedahan yang dibuat oleh peguam pembelaan sebagai memberitahu hakim bahawa perayu pertama akan berbohong apabila mengemukakan pembelaannya. Tiada apapun di peringkat itu yang boleh memberitahu mahkamah sama ada perayu pertama akan berbohong atau pun tidak. Lebih-lebih lagi apabila percakapan beramaran tidak berada di hadapan mahkamah.
- (2) Dalam rayuan semasa, berdasarkan nota hakim bicara, adalah tidak mungkin bahawa beliau telah berat sebelah. Tidak juga terdapat alasan untuk mengesyaki bahawa ekor dari pendedahan, hakim bicara tidak mampu untuk menunjukkan kesaksamaan atau bertindak secara adil dalam memutuskan kes.
- (3) Dalam kes semasa, Mahkamah Persekutuan tidak melihat wujudnya bahaya sebenar berat sebelah di pihak hakim bicara untuk meneruskan perbicaraan. Soal penafian pendengaran yang adil kepada tertuduh yang membawa kepada salah bawa keadilan tidak harus diambil dengan sebegitu ekstrim. Ia mestilah berasaskan kepada fakta dan halkeadaan sesuatu kes. Berdasarkan kepada fakta dan halkeadaan kes di sini, perayu-perayu tidak dinafikan perbicaraan adil yang boleh membawa kepada salah bawa keadilan.
- (4) Tiada keperluan untuk memanggil penterjemah berbangsa Myanmar untuk menyatakan kelayakannya. Dalam kes semasa, penterjemah telah dipanggil ke Mahkamah Tinggi untuk

- A menterjemah keterangan SP3. Sebagai seorang penterjemah Myanmar dilantik dan berdaftar dengan Registri Mahkamah Persekutuan, beliau berperanan sebagai seorang penterjemah rasmi mahkamah. Beliau dengan itu mempunyai kuasa untuk mengangkat sumpah serta perakuan-perakuan. Maka untuk
- B segala maksud, beliau adalah seorang pegawai mahkamah. Oleh itu, tiada keperluan untuk beliau mendapat perintah khas mahkamah sebelum boleh menjalankan tugas-tugas beliau.
- (5) Mahkamah Rayuan betul apabila memutuskan bahawa hakim bicara betul dalam menerima masuk keterangan SP3. Hujah perayu-perayu bahawa SP3 adalah seorang saksi berkepentingan adalah tidak berasas. Jikapun SP3 seorang saksi berkepentingan, tiada andaian undang-undang bahawa kesaksian seorang saksi berkepentingan tidak harus dipercayai.
- C Beliau berhak untuk dipercayai sehingga alasan-alasan kukuh untuk tidak mempercayainya dikemukakan, dengan mengambilkira halkeadaan kes dan keterangan-keterangan bertentangan. Menjadi kewajiban hakim bicara untuk memutuskan dengan mengambilkira kemungkinan-kemungkinan
- D kes dan berdasarkan fakta dan dokumen-dokumen kontemporari, sama ada seseorang saksi atau sekumpulan saksi-saksi itu telah bercakap benar berhubung dengan persoalan-persoalan yang penting. Dalam kes semasa, Mahkamah Persekutuan tidak dapat menyatakan bahawa keterangan SP3
- E harus dipertikai dan tidak harus dipercayai. Keterangan beliau berkaitan hal-hal yang penting kekal utuh.
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- (6) Kegagalan pendakwaan untuk menyatakan fakta-fakta tertentu dalam ucapan pembukaannya tidak menyebabkan apa-apa kemudaratan dan tidak menjejaskan kredibiliti SP3. Fakta-fakta berkenaan boleh didedahkan semasa perbicaraan. Mahkamah Persekutuan mengesahkan dapatan-dapatan mengenai kredibiliti yang dibuat oleh mahkamah bicara dan Mahkamah Rayuan.
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- (7) Pendakwaan mempunyai budibicara berhubung saksi manakah yang harus dipanggil dan mahkamah tidak akan campur tangan kecuali ianya dibuktikan bahawa pendakwaan dipengaruhi oleh motif-motif tidak baik atau terdapat kesengajaan tidak adil untuk menghalang saksi-saksi dari memberi keterangan dan tiada penjelasan munasabah diberi atas kegagalan menawarkan saksi-saksi. Ujiannya adalah sama ada wujud cubaan yang
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sengaja untuk menyorok fakta-fakta dari mahkamah dengan cara tidak mengemukakan keterangan yang berkenaan. Dalam kes semasa, kegagalan untuk memanggil peguam pemerhati atau sekurang-sekurangnya menawarkan beliau untuk pemeriksaan balas oleh pendakwa tidak menjejaskan kredibiliti SP3.

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- (8) Dalam kes semasa, hakim bicara telah menimbang semua keterangan yang dikemukakan di perbicaraan, menilai halkeadaan-halkeadaan yang relevan, dan menimbang kredibiliti saksi-saksi, termasuk dapatan bahawa keterangan kedua-dua perayu tidak boleh dipercayai, sebelum mencapai konklusi bahawa pendakwa telah membuktikan kesnya di luar keraguan munasabah dan bahawa perayu-perayu gagal membangkitkan sebarang keraguan munasabah kepada pertuduhan. Mahkamah Rayuan mendapati tiada alasan sah untuk mengganggu. Mahkamah Persekutuan juga mendapati tiada alasan untuk campur tangan.

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Case(s) referred to:

Abdul Latif Sakimin v. PP [2009] 1 LNS 130 CA (*refd*)

Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC (*refd*)

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Andy Bagindah v. PP [2000] 3 CLJ 289 CA (*refd*)

Balasingham v. PP [1959] 1 LNS 8 HC (*refd*)

Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC (*refd*)

David Anthony v. PP [1985] 1 MLJ 453 (*refd*)

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Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC (*refd*)

Liow Siow Long v. PP [1969] 1 LNS 98 HC (*refd*)

Metropolitan Properties Co (FGC) Ltd v. Lannon [1969] 1 QB 577 (*refd*)

Mohamed Ezam Mohd Nor & Ors v. Ketua Polls Negara [2001] 4 CLJ 701 FC (*refd*)

Ong Teng For & Anor v. PP [2011] 1 LNS 1308 CA (*refd*)

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PP v. Datuk Harun Haji Idris & Ors [1976] 1 LNS 184 HC (*refd*)

PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC (*refd*)

R v. Gough [1993] AC 646 (*refd*)

Timhar Jimdani Ong & Anor v. PP [2010] 3 CLJ 938 CA (*refd*)

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC (*refd*)

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Legislation referred to:

Oaths and Affirmation Act 1949, s. 4

Penal Code, s. 302

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- A *For the 1st appellant - Karpal Singh (Sangeet Kaur Deo with him);
M/s Karpal Singh & Co*
For the 2nd appellant - Hisham Teh Poh Teik; M/s Hisham Teh Poh Teik
For the respondent - Mangaikarasi Krishnan, DPP
- B *Reported by Andrew Christopher Simon*

JUDGMENT

Raus Sharif PCA:

C **Introduction**

- [1] Both the appellants were charged for an offence of murder under s. 302 of the Penal Code in the Taiping High Court.
- D The charge reads as follows:

- E Bahawa kamu dengan niat bersama-sama pada 15 April 2004 jam lebih kurang 5.30 petang di Kuala Sanggar, Selinsing, Semanggol, di dalam Daerah Kerian dalam Negeri Perak, telah melakukan pembunuhan hingga menyebabkan kematian ke atas Tan Ah Ching (L), No. KPT: 620504-08-5405. Dengan ini kamu telah melakukan satu kesalahan di bawah Seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama dan dibaca bersama-sama s. 34 Kanun Keseksaan.

- F [2] On 15 December 2009, the trial judge found both of the appellants guilty of the offence as charged. They were convicted and sentenced to death. Their appeal to the Court of Appeal was dismissed on 4 July 2011. Hence, this appeal to this court.

- G [3] We heard the appeal on 23 July 2012. Having heard the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

Facts

- H [4] The facts of this case have been fully narrated in the judgment of the High Court. It is also well set out in the judgment of the Court of Appeal. (see *Ong Teng For & Anor v. PP* [2011] 1 LNS 1308). Thus, we do not propose to repeat them here except to state the salient facts which are essential in determining the issues raised in this appeal.
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[5] The prosecution's case was founded on the evidence of the principal witness Sonia a/l Uchor (PW3). PW3 was an illegal immigrant from Myanmar, who was then working for the deceased in the latter's fish farm. PW3's evidence revealed that on 15 April 2004, at about 5.30pm, the appellants had arrived in a speedboat which they parked alongside the deceased's speedboat. PW3 saw the deceased talking to the appellants in an angry tone before arming himself with a piece of wood. PW3 then saw the second appellant taking out a pistol which he aimed at the deceased before handing the pistol to the first appellant. At that point the deceased had retreated but the first appellant followed him and fired five shots at the deceased. The appellants then left the scene in their speedboat, but shortly later returned. This time, the first appellant shot the deceased on the head. Thereafter, both the appellants fled the scene.

[6] In his defence, the first appellant alleged that it was the deceased who had abused and assaulted him with a piece of wood. And, it was the deceased who took out the pistol and shot at him once but missed him, and it was at that moment that he pounced on the deceased. In the struggle, the pistol slipped from the deceased's hand and he grabbed the pistol and fired a few times at the deceased. He then threw the pistol in the sea and left the scene with the second appellant.

[7] The second appellant's defence was that he merely accompanied the first appellant to meet the deceased at the latter's fish farm for the purpose of inquiring whether the deceased had trespassed into their cockle farm. The second appellant denied taking out a pistol and handing it to the first appellant to shoot the deceased. According to him, when he and the first appellant arrived at the scene, it was the deceased who started to abuse the first appellant verbally, and when the first appellant went up to the platform, the deceased was the aggressor who hit the first appellant with a piece of wood. The second appellant saw both the deceased and the first appellant moving to a corner and subsequently heard a loud sound, "bang, bang". Thereafter, the first appellant returned to the boat and they both left the scene.

[8] Before us, Mr. Karpal Singh, learned counsel for both the appellants, raised two preliminary issues:

- A (i) Failure of the trial judge to recuse himself from presiding over the trial after the defence was called;
- (ii) *Locus standi* of the Myanmar interpreter, Sien Win @ Abdullah bin Zakaria in interpreting the evidence of PW3.

B We will deal with the two issues in turn.

Failure Of The Trial Judge To Recuse Himself From The Presiding Over The Trial After The Defence Was Called

- C [9] It was submitted by Mr. Karpal Singh that the trial judge should have recused himself from presiding over the trial after the defence was called on 25 November 2008. His submission was based on what was recorded in the notes of proceedings immediately after the defence was called which reads as follows:

D T1 instructed me that he wished to give evidence on oath, substantially as per his cautioned statement.

E This morning there was discussion between his brother, I and Naran was told by T1 that he would not give evidence as per his last instruction (based on his cautioned statement). His line of defence would be completely different.

In those circumstances, I am unable to represent Ti for reasons not within my control.

F **Naran Singh**

I also wish to discharge myself on the same reason as given by Mr Manjit Singh.

- G [10] The above notes of proceedings were recorded in respect of the application by the defence counsel, Mr Manjit Singh and Mr Naran Singh, to discharge themselves from representing the first appellant. T1 in the notes referred to the first appellant while Mr Manjit Singh and Mr Naran Singh were then his counsel.

- H [11] In order to understand Mr Karpal Singh's argument fully, we reproduce his written submission on this issue:

I What emerges from the notes recorded by the learned judge clearly shows two defence counsels, not one, telling the judge in no uncertain terms that the 1st appellant would lie in putting up his defence.

It is significant to note that there is nothing in the notes of proceedings to show that the learned trial judge disregarded what was said by counsel. Neither is there anything in the judgment of the learned trial judge to indicate that he had adverted to what was said by counsel, the effect of it on him and steps taken by the learned trial judge to completely disabuse himself of the seriousness of the revelation that the appellant intended to lie under oath. It can be assumed from the statement of defence counsel that the cautioned statement which the 1st appellant intended to rely on was voluntarily made. Had it been otherwise, he would not have intended to rely on it unless it was exculpatory.

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The indication that his defence would be completely different from what he said in his cautioned statement compounds the position.

It is a matter of regret that even the learned judges of the Court of Appeal do not appear to have considered the significance and impact of what is stated at page 137 (Vol. 1 RR). Had the learned appellate judges done so, a ruling on the position would have been necessary.

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Be that as it may, the crucial question which requires to be addressed by this Court is whether the learned trial judge ought to have immediately gone through carefully the impact of what he had recorded and recused himself before further proceeding with the trial.

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Likewise, the learned judges of the Court of Appeal ought to have carefully read and considered the notes of proceedings at pg 137 and make a ruling on the position. However, it behoves upon this Court to take on the task of deciding on the preliminary issue raised for the first time on this score. This Honorable Court has the jurisdiction to do so under section 92 of the Court of Judicature Act 1964 and must do so in the interest of justice. The learned trial judge's continued presiding over the trial after disclosure amounts to depriving the appellants of a fair trial occasioning a miscarriage of justice.

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[12] In short, Mr Karpal Singh contended that the failure of the trial judge to recuse himself after the disclosure by Mr Manjit Singh that the first appellant was changing his line of defence amounted to the appellants being deprived of a fair trial occasioning a miscarriage of justice. In stressing the importance of a fair trial, Mr Karpal Singh referred to us a number a cases which includes *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, *Shamim*

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- A *Reza Abdul Samad v. PP* [2009] 6 CLJ 93 and *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265. Thus, the learned counsel was alleging that there was a likelihood of bias on the part of the trial judge as what had emerged from the notes, clearly shows the defence counsel was telling the judge that the first appellant would lie in putting up his defence.
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- [13] With respect, based on the notes of proceedings as reproduced earlier, we do not perceive that such disclosure made by the defence counsel would amount to telling the judge that the first appellant would lie in putting up his defence. In any event there was no way for the court at that stage to be able to know or identify of whether the first appellant would be lying or otherwise. This was especially so when the cautioned statement was not even before the court. One cannot assume what was said by the first appellant in the cautioned statement was the truth and anything else said otherwise would be a lie.
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- [14] The test in considering whether there is a likelihood of bias is well established. Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v. Lannon* [1969] 1 QB 577 said:
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- ... in considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case maybe, would or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice, if that reasonable people might think, he did. The reason is plain enough. Justice might be rooted in confidence; and confidence is destroyed when right-minded people go away thinking "The Judge was biased".
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- [15] The above test was applied by Gunn Chit Tuan J (as he then was) in *David Anthony v. PP* [1985] 1 MLJ 453 where we said:
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Applying the above test in considering whether there is a likelihood of bias in this case, I considered that in view of what has transpired since September 1983, the impression which might be created, to use the words of Abdoolcader J (as he then was) in Penang case of *Manoharan and Another v. Public Prosecutor* [1979] 1 MLJ 262, “in the mind of the disinterested man or woman on the Jelutong Omnibus”, or if I might add, if reasonable and fair minded person sitting in the Klang Magistrate’s Court and following the proceedings, might question or doubt the fairness of the trial and think that there was a real likelihood of bias, and might go away thinking “The Magistrate was biased”, then it would be preferable in the circumstances that the Magistrate concerned should not sit further to hear the case.

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[16] The question is, would a reasonable and fair minded person sitting in the Taiping High Court, and following the proceedings relating to the application by the defence counsel to discharge themselves from representing the first appellant, might think that there would be a real likelihood of bias when the trial judge continued hearing the case and go away thinking “The High Court Judge should have recused himself from hearing the case”. If that is so, then it would be preferable in the circumstances that the judge concerned should not sit further and hear the case. This is not the case here. We are of the view that no reasonable and fair minded person would have thought in such a way. Thus, from what had emerged from the notes recorded by the learned trial judge, it was unlikely that bias would occur on the part of the learned trial judge or there would not be any reason to suspect that as the result of the disclosure, the learned trial judge was incapable of producing the impartiality or detachment in deciding the case.

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[17] The test of whether a judge should recuse himself from hearing a case on the basis of perception of bias has been further developed by this court in *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. In that case, the issue was whether the learned trial judge should have recused himself from hearing the case on the basis of a perception of bias on his part in view of the fact that the appellants (ie, in that case) were being detained for their involvement in demonstrations held in protest against the learned trial judge’s decision in the conviction and sentence imposed on Dato’ Seri Anwar Ibrahim on 14 April 1997.

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- A Mohamed Dzaidin CJ (as he then was) held that the test to be applied is “the real danger of bias test” as enunciated by the House of Lords in *R v. Gough* [1993] AC 646, wherein it was held that based on the facts and circumstances of that case, there was no real danger of bias on the part of the learned trial judge
- B when he heard the appellant’s application for *habeas corpus*.

- [18] Similarly, on the facts and circumstances of this case, we do not see any real danger of bias on the part of the learned trial judge in continuing to preside over the trial. We are of the view that the notion of depriving the appellant of a fair trial, occasioning a miscarriage of justice, must not be taken to the extreme. It must be based on the facts and circumstances of each case; and, on the facts and circumstances of this case, we are of the view that the appellants had not been deprived of a fair trial occasioning a miscarriage of justice.
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[19] We, therefore find no merit on the first preliminary issue raised by Mr Karpal Singh.

- E *Locus Standi Of Myanmar Interpreter, Sein Win @ Abdullah bin Zakaria In Relation To SP3*

- [20] The second preliminary issue raised by Mr Karpal Singh is the *locus standi* of Myanmar interpreter. This issue of Myanmar interpreter arose due to the rejection by the learned trial judge of the defence’s application to recall the Myanmar interpreter for the purpose of knowing his qualification. The Court of Appeal addressed the issue in the following manner:
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- We now come to the issue of the Myanmar interpreter. From the notes of evidence appearing in the record of appeal the objection against the interpreter was raised after completion of not only the evidence of SP3 but also that of SP4 and SP5. The evidence of SP3 was recorded over a space of four days namely 3 January 2006, 4 January 2006, 5 January 2006 and 11 January 2006 and objection was only raised on 13 January 2006. From the record no objections were raised against the interpreter during the course of the recording of the evidence of the five witnesses. The fact that he is a free lance interpreter not from the Myanmar Embassy and not engaged full time by the Federal Court does not to our mind result in the evidence of SP3 as interpreted by him being unacceptable. Being registered as an interpreter by the Federal Court is by itself an acknowledgement of his qualification to
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interpret in the Myanmar language – hence, there is no necessity for the court to recall the interpreter just to state his qualification. The objection is without any merits whatsoever.

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[21] We are in agreement with the reasoning of Court of Appeal that there was no necessity to recall the Myanmar interpreter just to state his qualification. However, before us, Mr Karpal Singh raised a different issue; did the fact of registration by the Federal Court empower the Myanmar interpreter to administer the oath and affirmation having regard to s. 4 of the Oaths and Affirmation Act 1949 (Act 194) which reads:

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4. All courts and persons having, by law, or by order of reference by any court, or by consent of parties, authority to receive evidence are authorized to administer, by themselves or by an officer empowered by them in that behalf, oaths and affirmations in discharge of the duties or in exercise of the powers conferred upon them respectively as aforesaid.

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[22] According to Mr Karpal Singh, the phrase “or by order of reference by any court” does not include registration alone by the Federal Court. He argued that the section envisaged an order of court before any person could be clothed with the powers to administer oath and affirmation. Thus, he submitted that the Myanmar interpreter lacked the *locus standi* to act as an interpreter in the recording of evidence of PW3; and as such, the evidence of PW3 should accordingly be expunged. He further submitted that without the evidence of PW3, who was the sole eye-witness at the trial, there would be no evidence to constitute a *prima facie* case for the defence of both appellants to be called.

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[23] With respect, we are unable to agree. There is no dispute that Mr Sein Win @ Abdullah bin Zakaria is a registered Myanmar interpreter in the Federal Court registry. It is a known fact that there is a pool of interpreters of different nationals registered with the registry. Before they are registered as interpreters, they have to meet certain standard of proficiency in the languages for which they are registered with. Once they are registered, they would be called to serve on a need basis as interpreters in the courts throughout Malaysia. They are paid accordingly for the services rendered based on a fixed scale of fees.

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A [24] In the present case, Mr Sein Win @ Abdullah bin Zakaria
was called to Taiping Court to interpret the evidence of PW3.
Being a registered Myanmar interpreter with the Federal Court
Registry and by reason of his appointment thereof, he assumed
B the role of an official interpreter of the court; and therefore was
clothed with the powers to administer oaths and affirmations.
For all intents and purposes, he was an officer of the court.
Thus, there was no necessity for a special order of the court to
be made before he dispensed his duties. Accordingly, we are of
the view that Mr Karpal Singh's argument on this issue is also
C without any merit.

[25] Having dealt with the preliminary issue, we will now deal
with the substantive issues as raised by Mr. Hisham Teh Poh
Teik, the learned counsel who was also representing the second
D appellant. The learned counsel raised two main issues:

- (i) Misdirection by the Court of Appeal when it failed to
recognise that the trial judge did not test the evidence of
PW3 more vigorously in accordance with the maximum
evaluation; and
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(ii) Error in law on the part of the learned trial judge when he
did not address his mind on the failure of the prosecution to
call or offer Mr Manjit Singh for cross-examination to dispel
the assertion by the defence that SP3 had been coached by
F him.

[26] Again, we will deal with the two issues in turn.

*Misdirection By The Court Of Appeal When It Failed To Recognise
That The Learned Trial Judge Did Not Test The Evidence Of PW3
More Vigorously In Accordance With Maximum Evaluation*
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[27] The complaint by learned counsel was that the learned trial
judge failed to subject the evidence of PW3 to a greater test of
credibility since PW3 was an interested witness and he was the
single most important witness for the prosecution. He categorised
PW3 as an interested witness because PW3 was the employee of
the deceased and the wife of the deceased (PW4) had visited SP3
when he was in custody and buying provisions for him. Thus, it
was submitted that PW3's loyalty lay with the deceased and his
H family making it necessary for the learned trial judge to ask himself
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whether PW3 had any motive to give evidence the way he did. And the learned trial judge ought to have been more careful with PW3's evidence before he accepted it in total. According to learned counsel, had the learned trial judge undertaken a maximum examination of the evidence of PW3, he would have found that the evidence of PW3 was laced with contradictions and discrepancies that would definitely arouse caution on the part of the learned trial judge and this is especially when there was the allegation by the defence that PW3 may have been coached by the watching brief counsel or even PW4, to implicate the second appellant.

[28] The learned Deputy Public Prosecutor strongly argued otherwise. While she conceded that there were discrepancies and inconsistencies in PW3's evidence, that in itself was not enough to reject PW3's evidence. According to her, the learned trial judge as well as the Court of Appeal did address their mind to the contradictions and discrepancies appearing in the testimony of PW3, but found him to be a credible witness. Thus, she urged this court not to disturb such findings as there is no basis for this court to do so.

[29] Having gone through the records, the grounds of judgment of the learned trial judge and the Court of Appeal, we are of the view that the learned judges of the Court of Appeal were correct in ruling that the learned trial judge was right in accepting the evidence of PW3. The appellants' contention that PW3 was an interested witness is without any basis. Just because he was the employee of the deceased, and PW4 the widow of the deceased, had shown some kindness to him by visiting him several times when he was in prison and bringing provisions, did not make him an interested witness. Even if PW3 can be termed as an interested witness, there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (see *Balasingham v. PP* [1959] 1 LNS 8).

[30] In *Lioy Siow Long v. PP* [1969] 1 LNS 98, Raja Azlan Shah J (as His Majesty then was) speaking on the same subject held:

- A It is difficult to accept that suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witness who were at the scene of the occurrence and could have seen what had happened.
- B But if it is proved that they are not entirely disinterested witnesses e.g. they are either partisans of the complaint or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon. In my view the circumstances relied upon by counsel is not sufficient to cast any doubt on the evidence of PW1, who is not proved to be inimical to the
- C appellant ...

- [31] The same principle is applicable to the present case and on the facts, we are of the view that PW3 was neither partisan or was he in any way inimical to any of the appellants. It is just that he was unfortunate to be at the scene of the crime and saw what had happened. In another words he was an eye witness to the crime committed by the appellants and when he was called to give evidence, he narrated what he saw. No doubt there were inconsistencies and discrepancies in his evidence, which is to be expected but that by itself does not make him an untruthful witness.
- D
- E

[32] This issue was addressed by the Court of Appeal and held that:

- F On the challenge that SP3's evidence should be tested from the angle of motive and the contradictions and discrepancies appearing between his testimony in examination-in-chief and cross-examination and against the evidence of SP5 and SP10 in determining the issue of SP3's credibility, the learned trial judge had conducted an evaluation of the evidence as elucidated through
- G SP3 and SP5 and SP10 and was satisfied of SP3's credibility on the comprehension and understanding of Bahasa Malaysia. The trial judge's rationale was that though he may not be proficient nevertheless there was ample evidence that he could speak and understand Bahasa Malaysia.

- H [33] It is settled law that the credibility of a particular witness and the weight to be given to his other evidence is manifestly within the province of a trial judge. In *Andy Bagindah v. PP* [2000] 3 CLJ 289, Shaik Daud JCA said that:

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There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings

[34] Further, in *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 LNS 184, Raja Azlan Shah FJ (as His Royal Highness then was) said:

In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinized each evidence very carefully as this involves the question of weight to be given to certain evidence in a particular circumstances.

[35] In the final determination of issues, it is incumbent on the trial court to decide, having regard to the probabilities of the case and based on contemporaneous facts and documents, whether the witnesses or set of witnesses are speaking the truth on matters of central importance.

[36] On our part, we have gone through the instances of contradictions and discrepancies in the evidence of PW3, in particular with regard to his level of understanding of Bahasa Malaysia and Chinese language; but, we are however unable to hold that the testimony of PW3 should be discredited and not to be believed. His evidence on points of critical importance remained

- A intact. This is especially so when PW3 evidence is not about the conversation he heard between the deceased and the appellants, but rather what he saw at the scene of crime. He saw with own eyes that:
- B (a) Both the appellants came to the deceased's fish farm in a speedboat;
- (b) The second appellant taking an aim at the deceased with the pistol and then handed the pistol to the first appellant;
- C (c) The first appellant shot the deceased five times before leaving the scene; and
- (d) Both of the appellants came back a second time, with the second appellant driving the speedboat, and the first appellant then shot the deceased on the head.
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[37] Related to the issue of the credibility of PW3, is the issue of the prosecution's opening statement. It was pointed out by learned counsel that the fact that of the second appellant taking aim at the deceased with the pistol and then handing the pistol to the first appellant was not mentioned in the prosecution's opening statement and this by itself had cast another doubt as to the truth of PW3's evidence.

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[38] We now reproduce what was stated in the prosecution's opening statement in relation to this issue:

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Dalam kejadian ini terdapat saksi yang melihat kejadian yang berlaku lebih kurang jam 5.30 petang pada 15 April 2004. Dalam kejadian itu, kedua-dua tertuduh telah datang dengan menaiki bot menemui Tah Ah Ching (simati) di tempat kejadian dan kemudiannya berlaku pertengkaran. Kemudiannya salah seorang tertuduh telah melepaskan beberapa das tembakan ke arah simati.

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Setelah menembak simati kedua-dua tertuduh telah meninggalkan tempat kejadian dengan membawa sekali senjata api yang digunakan untuk menembak simati ...

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[39] From the above paragraph, it is clear that the fact of the second appellant taking out a pistol and aiming it at the deceased before handing it over to the first appellant, and the fact that both of the appellants returned to the fish farm and the first appellant fired a shot at the deceased's head were not stated in the opening

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statement. The question is whether such an omission was fatal to the prosecution's case. The law on opening statement by the prosecution is well settled. In *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 it was held that the prosecution is still at liberty to adduce evidence not mentioned in its opening address. The Court of Appeal in *Timhar Jimdani Ong & Anor v. PP* [2010] 3 CLJ 938 on the same issue held at p. 954 that:

The opening statement is not evidence. It is thus not a requirement that this statement shall contain elaborate details. The omission of the mention of any part of the prosecution's evidence in its opening statement, to us, is inconsequential and not destructive to the prosecution's case. Nor is the prosecution prevented, later, from adducing any evidence not earlier mentioned in its opening statement.

[40] We endorse the above view. As such, the prosecution's omission to state the facts mentioned earlier is inconsequential and does not affect the credibility of PW3. We are of the view that the omission highlighted here which forms part of the prosecution's detailed evidence, can be revealed at the trial stage. In the circumstances, we uphold the credibility findings by the trial court; and latter, the Court of Appeal.

The Failure By The Prosecution To Call Or At Least Offer Mr Ranjit Singh For Cross-examination Has Further Compromised The Credibility Of PW3

[41] Mr Ranjit Singh was the counsel holding watching brief for the deceased family. The Court of Appeal in addressing the issue of the failure of the prosecution to call or at least offer Mr Ranjit Singh for cross-examination held as follows:

[26] Turning to the second ground of challenge in that the prosecution's failure to call or at least offer Mr Ranjit Singh (the solicitor for the family of the deceased) for cross-examination has compromised the credibility of SP3 is to our mind without merits. Though there was a suggestion that the visit by Mr Ranjit Singh to SP3 was to coach SP3 to give evidence in court nevertheless it was vehemently denied by SP3.

[42] The learned trial judge had also addressed his mind to the issue:

- A Mahkamah bersetuju dengan hujah TPR bahawa peranan En. Ranjit hanyalah sebagai peguam pemerhati kepada keluarga simati. Menurut isteri simati (SP4) En. Ranjit ada menemui SP3 di penjara bersamanya sebanyak 2 kali untuk memastikan keselamatan SP3 di penjara (lihat muka surat 35 nota keterangan).
- B Keterangan yang SP3 berikan di hadapan Mahkamah adalah seperti yang beliau lihat dan beliau alami. Ianya bukan ditunjukkan oleh SP4 atau pun En. Ranjit.

- C Ini kerana semasa lawatan Mahkamah ke tempat kejadian pada 4.1.2006, SP3 tanpa teragak-agak telah menunjukkan tempat di mana simati dan tempat beliau berada semasa simati ditembak. Ini menunjukkan SP3 tidak diajar oleh sesiapa pun untuk memberi keterangan di Mahkamah.

- [43] On our part, we are of the view that the prosecution cannot be faulted for not calling Mr Ranjit Singh as a witness or to offer him to the defence for cross-examination. It is trite that the prosecution has a discretion as to which witness should be called and the court will not interfere unless it is shown that the prosecution has been influenced by some oblique motive (see *Abdul Latif Sakimin v. PP* [2009] 1 LNS 130) or the witness had been deliberately or unfairly held back and no reasonable explanation is given by the prosecution for the non offering of the witness (see *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19). In other words the test is whether there was any conscious attempt to suppress facts from the court by not tendering that particular piece of evidence. In the instant case, the prosecution never hide the fact that Mr Ranjit Singh had visited PW3 in prison. And it is not in dispute that Mr Ranjit Singh was present in court throughout the trial. Thus, if the defence were serious about their allegation of coaching, they could have easily called Mr Ranjit Singh to testify. Therefore, the non calling of Mr Ranjit Singh or at least offering him for cross-examination by the prosecution had not compromised the credibility of PW3.

Conclusion

- H [44] Thus, what is left to be decided is whether the prosecution had proved its case against both of the appellants beyond reasonable doubt or that the defence had raised a reasonable doubt as to the truth of the prosecution's case. We are of the
- I view that the learned trial judge had considered all of the evidence

adduced at the trial, evaluated the relevant circumstances, and assessed the credibility of the witnesses, including the finding that the evidence of both the appellants were to be disbelieved, before arriving at the conclusion that the prosecution had established its case beyond reasonable doubt and the appellants had failed to raise a reasonable doubt to the charge. The Court of Appeal found no valid reason to disturb the said findings of fact of the learned trial judge. We too have no valid reason to do the same.

[45] In the circumstances, we find that the conviction against both the appellants is safe. We therefore dismissed the appeal. The conviction and sentence imposed on both the appellants by the courts below is affirmed.

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